Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Communications Act of 1934	)	WT Docket No. 97-197
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules To Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Katherine M. Harris
Stephen J. Rosen
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 429-7000

Mark J. Golden,
Senior Vice President, Industry Affairs
Sheldon Moss
Manager, Government Relations
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561
(703) 739-0300

October 9, 1997

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Communications Act of 1934	)	WT Docket No. 97-197
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules To Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA"),[1] by its attorneys, hereby submits its comments on the Commission's Notice of Proposed Rulemaking in the above-

[1] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

captioned proceeding.[2] As detailed below, the Commission should exercise its clear statutory authority under Sections 332(c)(7)(B)(iv) and (v) of the Communications Act of 1934, as amended,[3] and promulgate regulatory procedures that allow for the swift and efficient preemption of state and local zoning actions that attempt to regulate radio frequency ("RF") emissions in a manner inconsistent with federal standards.

I. INTRODUCTION AND SUMMARY

As noted by the Commission, on March 19, 1997, PCIA submitted an *ex parte* letter to the Chief and Deputy Chief of the Wireless Telecommunications Bureau,[4] in which it urged the Commission to establish a mechanism for speedy and equitable resolution of situations where a wireless carrier believes that a state or local agency has improperly attempted to regulate tower siting based on the environmental effects of RF emissions. Specifically, PCIA requested that the Commission: (1) clearly define the testing and reporting requirements that states and localities could require in order to ensure compliance with the FCC's RF standards; (2) prohibit zoning boards from denying tower siting applications on RF grounds, absent an affirmative showing that a zoning applicant has failed to comply with federal RF standards; and (3) promulgate

---

[2] *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, FCC 97-303 (Aug. 25, 1997) (Second Memorandum Opinion and Order and Notice of Proposed Rulemaking) ("*Second MO&O*" and "*Further Notice*").

[3] 47 U.S.C. §§ 332(c)(7)(B)(iv), (v).

[4] Letter from Jay Kitchen, President of PCIA, to Michele Farquhar, Chief, and Rosalind Allen, Deputy Chief, Wireless Telecommunications Bureau at 2 (Mar. 19, 1997).

streamlined procedures to allow for the rapid and efficient processing of petitions to preempt state and local regulations that conflict with federal RF standards.

PCIA continues to endorse the aforementioned Commission action as both clearly authorized by the Communications Act and in the public interest. Statutorily, Sections 332(c)(7)(B)(iv) and (v) offer one of the most unambiguous grants of federal jurisdiction found in the Communications Act — provided a "personal wireless service facilit[y]" complies with "the Commission's regulations concerning [RF] emissions," states and localities are flatly prohibited from "regulating the placement, construction, and modification" of these facilities "on the basis of the environmental effects of radio frequency emissions."[5] Further, the Commission — and not the courts — has been granted exclusive jurisdiction to provide "relief" to parties that have been adversely affected by state and local actions and failures to act inconsistent with subsection (iv).[6]

As a matter of public interest, the wireless telecommunications industry, and especially new entrants such as PCS providers, must have a fair opportunity to build new or modified infrastructure. Without such opportunity, further competition and the emergence of new services will be thwarted, and existing carriers will be locked into increasingly obsolete technologies. This infrastructure is necessary in order to fulfill the Commission's goals of maximizing competition in the wireless industry and providing the public with new and innovative services, including enhanced 911 service.

---

[5] 47 U.S.C. § 332(c)(7)(B)(iv). *See also* H.R. Rep. 104-458, at 208 (1996) ("Conference Report") (prohibiting states and localities from regulating tower siting based "directly or indirectly" on the environmental effects of RF emissions).

[6] 47 U.S.C. § 332(c)(7)(B)(v).

PCIA respects the fact that states and localities generally have broad authority over zoning matters. Because, however, Congress has made it clear that this authority does not extend to regulation in any form of RF emissions standards for personal wireless facilities, principles of federalism should not bar prompt Commission action. To the contrary, Congress has directed the Commission to take regulatory control of RF issues involving personal wireless service facilities and to resolve by preemption any conflicting efforts by state or local governments.

Against this background, the Commission should take the following steps to ensure that states and localities do not attempt to regulate tower siting on the basis of RF emissions when the facility in question is in compliance with the Commission's RF standards. First, the Commission should ensure that state and local tower siting decisions that are based either directly or indirectly on the environmental effects of RF radiation are quickly and efficiently preempted by: (1) allowing licensees to file preemption petitions immediately following an adverse zoning board decision or similar action, without exhausting all appeals; (2) setting a clear deadline after which a licensee can petition for the preemption of a locality's "failure to act;" (3) preempting state and local regulations that are based "indirectly" on RF emissions; and (4) exerting its preemptive authority over all instrumentalities of states and localities, including towns, villages, and school districts.

Second, the Commission should enact the demonstration of compliance with federal RF emissions standards it has denominated "Alternative One." This approach squarely meets the requirements of Section 332(c)(7)(B)(iv) by requiring no greater showing of compliance to state and local authorities than is made before the FCC. The more onerous demonstration of compliance entailed by "Alternative Two," in contrast, might force licensees to meet a myriad of differing state and local requirements, imposing undue costs and delays, a result that is clearly in

conflict with the broadly preemptive language of this section. For this reason, the Commission should alter the approach enumerated under its non-binding policy statement for addressing preemption requests during the pendency of this proceeding.

Finally, the procedures for reviewing preemption petitions should be as streamlined and efficient as possible, and result in Commission action on a timely basis. These procedures should include requirements that the Commission act on preemption petitions within 30 days of the close of the pleading cycle, that the Commission adopt a rebuttable presumption that personal wireless facilities comply with its RF exposure guidelines, and that participation in preemption proceedings be limited to "interested parties," including those "adversely affected" by a state or local action.

II. CONSISTENT WITH ITS STATUTORY AUTHORITY, THE COMMISSION MUST ASSERT ITS PREEMPTIVE AUTHORITY OVER ALL STATE AND LOCAL ZONING DECISIONS THAT ARE PREMISED ON THE HEALTH OR ENVIRONMENTAL EFFECTS OF RF EMISSIONS

In its *Notice*, the Commission asks a series of jurisdictional questions addressing the Commission's authority to preempt state and local zoning decisions that are based on the health or environmental effects of RF radiation. Consistent with its broad authority to regulate RF emissions under Section 332(c)(7), the Commission should take a number of steps that will ensure that all state and local zoning actions — whether directly or indirectly based on the environmental effects of RF emissions— can be resolved by the Commission as quickly and efficiently as possible.

Preliminarily, the Commission is correct in its tentative conclusion that, pursuant to Section 332(c)(7)(B)(v), a "wireless provider could seek relief from the Commission from an

adverse action of a local zoning board or commission while its independent appeal of that denial is pending before a local zoning board of appeals."[7] The Commission justifies its conclusion by pointing out that the legislative history of this section defines "final action," as "final administrative action at the State or local government level,"[8] which would include a zoning board decision. This is a reasonable interpretation of the statutory section, although PCIA notes that the phrase "final action" is used in Section 332(c)(7)(B)(v) to refer *only* to the prerequisite for judicial review. Commission review of potential violations of Section 332(c)(7)(B)(iv) is triggered merely by "an act ... by a State or local government ... that is inconsistent with clause (iv)." Thus, the Commission need not grapple with the definition of a "final action" that is potentially subject to its review. Nonetheless, given the Commission's perspective as reflected in the *Notice*, PCIA concurs that the Commission is entitled to review any state or local ruling implicating RF emissions concerns without requiring a wireless carrier first to exhaust all other appeals or administrative remedies.

With regard to "failure to act," PCIA disagrees with the Commission's conclusion to determine on a case-by-case basis whether a state or local government has inappropriately failed to act.[9] This statement of policy gives states and localities broad discretion to delay action on tower siting applications for unreasonable periods of time under the guise of evaluating an applicant's compliance with RF safety standards. The Commission effectively would create a huge and unacceptable loophole in Section 332(c)(7)(B)(iv)'s broad grant of federal authority. In

---

[7] *Notice*, ¶ 137.

[8] Conference Report at 209.

[9] *Notice*, ¶ 138.

order to avoid the distinct possibility that states and localities will create "de facto" moratoria by failing to act on an applicant's tower siting application while they "evaluate" compliance with RF safety requirements, the Commission should set a clear deadline for local action on tower siting applications, and accept preemption petitions filed after that deadline has expired. Otherwise, state and local governments will simply decline to act on tower siting applications, knowing that they can impose even further delay by arguing to the Commission about the reasonableness of the timeframe for action and then awaiting Commission resolution.

Further, the Commission is empowered to — and must — preempt state and local regulations that are based "indirectly" on RF emissions,[10] or "appear to be based on RF concerns but for which no formal justification is provided."[11] Both Section 332(c)(7)(B)(iv) and its legislative history make it clear that Congress intended to prevent a state or locality "from basing the regulation of the placement, construction or modification of CMS facilities *directly or indirectly* on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations ...."[12]

Thus, as the Commission has tentatively concluded, there does not need to be a formal finding that a zoning decision was based entirely on RF concerns in order for that decision to be preempted by the Commission.[13] Rather, if a zoning board hearing was dominated by citizen testimony about the adverse health effects of RF emissions, but the written decision denied the

---

10 *Id.*, ¶ 139.

11 *Id.*, ¶ 140.

12 Conference Report at 208 (emphasis added).

13 *Notice*, ¶ 140.

application either summarily or based on non-RF considerations, the Commission would be empowered to preempt this decision.[14] Unless the Commission exerts such flexible preemption authority, states and localities will be able easily to skirt the requirements of Section 332(c)(7)(b)(iv) by couching RF-based zoning decisions in non-RF terms.[15]

Finally, while PCIA takes no position at this time as to whether the Commission has preemptive authority over private entities such as homeowners associations and private land covenants,[16] the Commission is statutorily directed to preempt the actions of "State or local government[s] *or any instrumentality thereof*," that attempt to regulate tower siting based on RF emission requirements that are inconsistent with federal standards.[17] Thus, the Commission has plenary authority over all instrumentalities of states and localities, including towns, villages, and school districts. Accordingly, any action by *any* state or local agency or body restricting tower siting based on RF issues must be fully preempted by the Commission.

---

[14] Another means by which states and localities indirectly regulate the environmental effects of RF emissions is through the use of setbacks. As stated by the National League of Cities, "Some localities, such as Oldham County, Kentucky, Jefferson County, Colorado, Multnomah County, Oregon, and King County, Washington, use setbacks in an effort to address the issue of potential health risks of electromagnetic radiation." National League of Cities, *Local Officials Guide: Siting Cellular Towers* 12 (1997) ("*Local Officials Guide*").

[15] The Commission's proposal to preempt "only that portion of an action or failure to act that is based on RF emissions," *Notice*, ¶ 139, seems to be practically unworkable. A partial preemption would appear to let stand a zoning decision that involved impermissible considerations. Thus, if RF issues have been improperly considered, a zoning decision must be fully preempted.

[16] *Notice*, ¶ 141.

[17] 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).

III. WIRELESS CARRIERS SHOULD BE ENTITLED TO DEMONSTRATE COMPLIANCE TO STATES AND LOCALITIES USING THE SAME SHOWINGS MADE TO THE COMMISSION

The Commission proposed two alternative procedures by which licensees could demonstrate compliance with federal RF standards for the purpose of meeting state and local regulatory requirements. Under both Alternative One[18] and Alternative Two,[19] for non-categorically excluded facilities, states and localities are limited to requesting copies of all documents related to RF emissions that were submitted to the Commission as part of the licensing process. For categorically excluded facilities, states and localities are limited under Alternative One to requesting written certification by the wireless carrier that the facility complies with the Commission's RF guidelines,[20] while under Alternative Two,[21] states and localities can request a more detailed "demonstration of compliance."[22]

The Alternative One approach is the compliance regime contemplated by and consistent with the broadly preemptive language of Section 332(c)(7)(B)(iv), and should be adopted by the

---

[18] *Notice*, ¶ 143.

[19] *Id.*, ¶ 144.

[20] *Id.*, ¶ 143.

[21] *Id.*, ¶ 144.

[22] In discussing its interim policy for addressing preemption requests during the pendency of this rulemaking proceeding, the Commission provides greater definition about the potential nature of the Alternative Two "demonstration of compliance." *See Notice*, ¶ 146. It is clear that this proposed demonstration far exceeds the data that must be submitted to the Commission. Moreover, if the delineated information submission were adopted by the Commission, it would impose substantial and unnecessary burdens on wireless carriers. In addition, the demonstration requirement could be used by state and local decision-makers to delay action on tower siting proposals.

Commission. Specifically, states and localities are prohibited from regulating the placement of wireless facilities based on the environmental effects of RF emissions, provided the facility in question complies "with *the Commission's regulations concerning such emissions.*"[23] Alternative One fits squarely within the statute by limiting states and localities to requiring no greater showing of RF compliance than is mandated by the Commission.

Alternative Two, on the other hand, is not consistent with the Commission's statutory mandate. The combination of the detailed showing suggested by the Commission and the fact that localities will have substantial flexibility to promulgate their own requirements within these broad guidelines will completely eviscerate the preemptive intent of Section 332(c)(7)(B)(iv) by allowing each state and locality to impose its own jumble of compliance requirements. Moreover, the more complex demonstration requirements can be manipulated as a tool simply to delay permitting construction of tower and transmitter facilities.

The unacceptability of Alternative Two to the wireless industry is exacerbated by the fact that the FCC Local and State Government Advisory Committee ("LSGAC") has already stated that licensees should be required to bear *all* of the costs of producing whatever compliance documentation states and localities require.[24] This financial burden would be imposed on wireless carriers regardless of the level of justification for the state or local agency to believe that some sort of demonstration of compliance was necessary Should Alternative Two be enacted, these expenses will mount rapidly, as licensees will be required to pay for a different set of documentation requirements in each political subdivision in which they have a categorically

---

[23] 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).

[24] *See Notice*, ¶ 144 (citing LSGAC Letter at 2).

excluded facility.[25] This runs contrary to the Commission's own goal of imposing only "a minimal burden" on wireless carriers while seeking to satisfy "legitimate" state and local government interests.[26]

There may be occasions where a locality has some reason to believe that a personal wireless service facility is not operating in compliance with the Commission's RF standards. In order to guard against abuse, the locality's first line of recourse should be to go to the Commission for assistance in verifying ongoing compliance. Otherwise, state and local agencies may impose unreasonable measurement and reporting requirements on the basis of unsupported allegations of non-compliance.

PCIA strenuously objects to the Commission's plan to use an Alternative Two-type approach to serve as a baseline for evaluating preemption requests during the pendency of this rulemaking. This sends the wrong message to state and local governments, in effect signaling them that they may impose onerous compliance demonstration requirements on wireless carriers. Moreover, this interim policy may be in place for a substantial period of time, since it is

---

[25] *See, e.g.*, Los Altos, Calif. Ordinance (requiring "a professional evaluation of the RF and electromagnetic field exposure conditions of the facility demonstrating that: a) the radiation levels generated by the facility meet Federal standards in effect and pose no health risks to the public; and b) interference to consumer electronic products (televisions, stereos, cordless telephone, etc.) is unlikely to occur," and requiring the report to "be prepared in a format and manner which is comprehensible by the average person"); Kreines & Kreines, Inc./Cape Cod Commission, *Siting Criteria for Personal Wireless Service Facilities* 36 (June 1997) ("[l]ocal governments can require, as part of their review procedures, that an applicant demonstrate that a proposed personal wireless service facility meets the FCC Guidelines ... towns can also require periodic readings paid for by the applicant with result provided to the FCC and the local Board of Health"); *Local Officials Guide* at 12 (Greenburgh, New York has created a "body to monitor antennas to make sure that federal emission standards are met," and this body is "*financed by an escrow account made up of a percentage of permit and leasing fees*").

[26] *Notice* ¶ 144.

uncertain when the Commission will conclude action in this proceeding. While PCIA believes that expeditious resolution of these issues is essential to the timely buildout and modification of wireless systems, no one can predict when this rulemaking will be concluded and necessary rules and policies will become effective.

IV. THE PROCEDURES FOR REVIEWING REQUESTS FOR RELIEF SHOULD BE STREAMLINED AND EFFICIENT

The Commission finally asks a number of questions regarding the procedures it should use to resolve preemption petitions. As described in greater detail below, these procedures should be as streamlined as possible in order to allow for the rapid and administratively simple preemption of state and local actions that clearly conflict with the Commission's RF exposure requirements. Without such streamlined procedures, licensees will be faced with the lose-lose choice between expending an inordinate amount of resources to comply with state regulations that violate the Communications Act, or expending an almost equivalent amount of resources in petitioning the Commission to preempt these *ultra vires* regulations.

The Commission's proposal to utilize its declaratory ruling process to process preemption petitions[27] meets these efficiency requirements, *provided* that the Commission agrees to rule on such petitions within 30 days of the completion of the pleading cycle. This 30-day time limit will ensure that licensees are provided with a ruling in a timeframe that is consistent with their business need to make a decision to either build the facility in question, appeal the adverse Commission ruling, or make alternative siting arrangements.

---

[27] *Notice*, ¶ 149.

In addition, PCIA agrees with the Commission's tentative conclusion that it should adopt a rebuttable presumption that personal wireless facilities comply with the FCC's RF exposure guidelines.[28] Such a rebuttable presumption is more efficient for licensees and localities, and consistent with Commission precedent. This presumption is efficient for licensees because they are already required to either certify or demonstrate that they comply with the Commission's RF rules as a condition of being granted a license. Thus, it would be non-sensical and unreasonably expensive to require licensees to make this showing twice — once when they apply for a license and once when they file a preemption petition.

Further, as noted by the Commission, this rebuttable presumption has worked well in other contexts, including the regulation of satellite earth stations,[29] where state and local regulation of such devices is presumed to be unreasonable, and localities can rebut this presumption by demonstrating that their regulations are necessary health and safety measures. Similarly, businesses are granted a rebuttable presumption that their non-common area workplace telephones are hearing aid compatible, and this presumption can be rebutted on a telephone-by-telephone basis.[30] There is no reason why this procedural device should not work equally well in the context of compliance with the Commission's RF exposure regulations.

---

[28] *Notice*, ¶ 151.

[29] *Preemption of Local Zoning Regulations of Satellite Earth Stations*, 11 FCC Rcd 5809, ¶ 31 (1996) (Report and Order and Notice of Proposed Rulemaking).

[30] *See Access to Telecommunications Equipment and Services by Persons with Disabilities*, 11 FCC Rcd 8249 (1996) (Report and Order).

PCIA agrees with the Commission that an entity seeking to rebut the presumption of compliance should bear the burden of proof to make a *prima facie* case for noncompliance.[31] Moreover, only "interested parties" should be permitted to challenge the presumption of compliance.[32] These procedural policies will help to ensure the legitimacy of challenges to a wireless facility's compliance with the Commission's RF exposure requirement and minimize the expenditure of Commission and carrier resources on frivolous or spurious claims.

Finally, PCIA agrees that the public interest will be served by limiting participation in preemption proceedings to "interested parties," including persons "adversely affected"[33] by the actions of a state or locality. A limitation on frivolous filings will reduce the administrative burden, as well as facilitate the Commission's ability to act within the 30-day timeframe advocated by PCIA.

V. CONCLUSION

The Commission has been given a broad and explicit grant of statutory authority under Sections 332(c)(7)(b)(iv) and (v) to prevent states and localities from basing tower siting decisions on the environmental effects of RF emissions of the facility in question, provided the facility complies with federal standards. In order to carry out the mandate of Congress, and to prevent states and localities from retarding the growth of the nation's wireless infrastructure, this authority should be swiftly and decisively exercised.

---

[31] *Notice*, ¶ 153.

[32] *See, id.*

[33] 47 U.S.C. § 332(c)(7)(B)(v); *Notice*, ¶ 150.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: _____

Katherine M. Harris
Stephen J. Rosen
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
(202) 429-7000

By: _____

Mark J. Golden,
Senior Vice President, Industry Affairs
Sheldon Moss
Manager, Government Relations
PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561
(703) 739-0300

October 9, 1997